

1  
2  
3  
4  
5  
6  
7  
8 **UNITED STATES DISTRICT COURT**  
9 **DISTRICT OF NEVADA**

10 MOHINDER SINGH,  
11 #1029496

12 Plaintiff,

13 vs.

14 REX REED, *et al.*,

15 Defendants.  
16 \_\_\_\_\_

)  
)  
) 3:10-cv-00567-ECR-RAM  
)  
)  
)

17 **ORDER**  
18  
19

20 This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. The court now  
21 reviews the complaint.

22 **I. Screening Standard**

23 Federal courts must conduct a preliminary screening in any case in which a prisoner seeks  
24 redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. §  
25 1915A(a). Pursuant to the Prisoner Litigation Reform Act (PLRA), federal courts must dismiss a  
26 prisoner's claims, "if the allegation of poverty is untrue," or if the action "is frivolous or malicious,"  
"fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who  
is immune from such relief." 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks an  
arguable basis either in law or in fact. *Nietzke v. Williams*, 490 U.S. 319, 325 (1989). The court may,

1 therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or  
2 where the factual contentions are clearly baseless. *Id.* at 327. The critical inquiry is whether a  
3 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson*  
4 *v. Arizona*, 885 F.2d 639, 640 (9<sup>th</sup> Cir. 1989).

5 Dismissal of a complaint for failure to state a claim upon which relief may be granted is  
6 provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under  
7 Section 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under  
8 Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*,  
9 232 F.3d 719, 723 (9<sup>th</sup> Cir. 2000). A complaint must contain more than a “formulaic recitation of the  
10 elements of a cause of action;” it must contain factual allegations sufficient to “raise a right to relief  
11 above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965  
12 (2007). “The pleading must contain something more...than...a statement of facts that merely creates a  
13 suspicion [of] a legally cognizable right of action.” *Id.* In reviewing a complaint under this standard,  
14 the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex*  
15 *Hospital Trustees*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to  
16 plaintiff and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

17 Allegations in a *pro se* complaint are held to less stringent standards than formal  
18 pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S.  
19 519, 520-21 (1972) (*per curiam*); *see also Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9<sup>th</sup>  
20 Cir. 1990). All or part of a complaint filed by a prisoner may be dismissed *sua sponte*, however, if the  
21 prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based on legal  
22 conclusions that are untenable (*e.g.* claims against defendants who are immune from suit or claims of  
23 infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual  
24 allegations (*e.g.* fantastic or delusional scenarios). *See Neitzke*, 490 U.S. at 327-28; *see also McKeever*  
25 *v. Block*, 932 F.2d 795, 798 (9<sup>th</sup> Cir. 1991).

1 To sustain an action under section 1983, a plaintiff must show (1) that the conduct  
2 complained of was committed by a person acting under color of state law; and (2) that the conduct  
3 deprived the plaintiff of a federal constitutional or statutory right.” *Hydrick v. Hunter*, 466 F.3d 676,  
4 689 (9<sup>th</sup> Cir. 2006).

## 5 **II. Instant Complaint**

6 Plaintiff, who is incarcerated at Lovelock Correctional Center (“LCC”), has sued Rex  
7 Reed, caseworkers Rogelio A. Herrera and Mrs. Crone, Warden Jack Palmer, and Nevada Department  
8 of Corrections (“NDOC”) Director Howard Skolnik. Plaintiff alleges violations of his Fourteenth  
9 Amendment due process rights.

10 Plaintiff claims that Herrera classified him as a sex offender, despite the fact that he has  
11 never been convicted of any sex offense. Warden Palmer and Director Skolnik have denied his  
12 grievances, and the classification committee has refused to change his status. Defendant Crone told  
13 plaintiff that he has “no further access to the grievance system and any further action would result in  
14 disciplinary action.” Plaintiff states that this incorrect classification has affected his eligibility for parole,  
15 minimum custody and house arrest.

16 First, while plaintiff names Rex Reed, administrator of the Offender Management  
17 Division, as a defendant, “[l]iability under [§] 1983 arises only upon a showing of personal participation  
18 by the defendant. A supervisor is only liable for the constitutional violations of . . . subordinates if the  
19 supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent  
20 them. There is no respondeat superior liability under [§] 1983.” *Taylor v. List*, 880 F.2d 1040, 1045  
21 (9<sup>th</sup> Cir. 1989) (citations omitted); *see also Hydrick v. Hunter*, 500 F.3d 978, 988 (9<sup>th</sup> Cir. 2007); *Ortez*  
22 *v. Washington County, State of Or.*, 88 F.3d 804, 809 (9<sup>th</sup> Cir. 1996) (concluding proper to dismiss where  
23 no allegations of knowledge of or participation in alleged violation). Plaintiff does not describe any  
24 specific actions by Reed, nor does he allege that Reed had knowledge of or participated in any alleged  
25 civil rights violation. Defendant Reed is dismissed from this action.

1           With respect to plaintiff's due process claims, "[p]risoners . . . may not be deprived of  
2 life, liberty or property without due process of law . . . [T]he fact that prisoners retain rights under the  
3 Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the  
4 nature of the regime to which they have been lawfully committed . . . ." *Wolff v. McDonnell*, 418 U.S.  
5 539, 556 (1974). In order to state a cause of action for deprivation of procedural due process, a plaintiff  
6 must first establish the existence of a liberty interest for which the protection is sought. In *Sandin v.*  
7 *Connor*, 515 U.S. 472, 487 (1995), the Supreme Court abandoned earlier case law holding that states  
8 created protectable liberty interests by way of mandatory language in prison regulations. *Id.* Instead,  
9 the Court adopted an approach in which the existence of a liberty interest is determined by focusing on  
10 the nature of the deprivation. *Id.* In doing so, the Court held that liberty interests created by prison  
11 regulations are limited to freedom from restraint which "imposes atypical and significant hardship on  
12 the inmate in relation to the ordinary incidents of prison life." *Id.* at 484.

13           In *Sandin*, the Court focused on three factors in determining that plaintiff possessed no  
14 liberty interest in avoiding disciplinary segregation: (1) disciplinary segregation was essentially the same  
15 as discretionary forms of segregation; (2) a comparison between the plaintiff's confinement and  
16 conditions in the general population showed that the plaintiff suffered no "major disruption in his  
17 environment;" and (3) the length of the plaintiff's sentence was not affected. *Sandin*, 515 U.S. at 486-  
18 87.

19           In the case of an inmate who was incorrectly classified as a sex offender, this court  
20 previously has found that such classification resulted in atypical and significant hardship sufficient to  
21 invoke the procedural protections of the due process clause. *Kritenbrink v. Crawford*, 457 F.Supp.2d  
22 1139, 1149 (D. Nev. 2006). The Ninth Circuit has detailed what process is due when classifying an  
23 inmate as a sex offender. *Neal v. Shimoda*, 131 F.3d 818, 830-31 (9<sup>th</sup> Cir. 1997). In *Neal v. Shimoda*,  
24 the court emphasized that the prisoner must receive: (1) a prior hearing with the ability to call witnesses  
25 and present documentary evidence, (2) advance written notice of the prior hearing, and (3) a written  
26 statement by the fact-finder of the evidence relied on and the reasons for the inmate's classification as

1 a sex offender. *Id.* at 830. Plaintiff alleges that he has been labeled a sex offender and has been denied  
2 a hearing with advance written notice, at which he may present witnesses and documents and after which  
3 he receives a statement of the fact-finder's decision. Plaintiff states a Fourteenth Amendment due  
4 process claim against the remaining defendants.

5 Finally, the court advises plaintiff that documents that he has filed styled "notice" or  
6 "letter" are improper *ex parte* communications with the court. Local Rule 7-6(a). The court does not  
7 conduct litigation by letter. If plaintiff seeks action by the court, including appointment of counsel, he  
8 shall file a motion.

### 9 **III. Conclusion**

10 **IT IS THEREFORE ORDERED** that the Clerk shall **FILE** the complaint (docket #1-  
11 2).

12 **IT IS FURTHER ORDERED** that plaintiff's claims against Rex Reed are dismissed.  
13 Defendant Reed is **DISMISSED** from this action.

14 **IT IS FURTHER ORDERED** that plaintiff's Fourteenth Amendment due process  
15 claims **MAY PROCEED** against the remaining defendants.

16 **IT IS FURTHER ORDERED** as follows:

17 1. The Clerk shall electronically serve a copy of this order, including the attached Notice  
18 of Intent to Proceed with Mediation form, along with a copy of plaintiff's complaint, on the Office  
19 of the Attorney General of the State of Nevada, to the attention of Pamela Sharp.

20 2. The Attorney General's Office shall advise the Court within **twenty-one (21) days** of the date  
21 of entry of this order whether it can accept service of process for the named defendants. As to any of  
22 the named defendants for which the Attorney General's Office cannot accept service, the Office shall  
23 file, *under seal*, the last known address(es) of those defendant(s).

24 3. If service cannot be accepted for any of the named defendant(s), plaintiff shall file a motion  
25 identifying the unserved defendant(s), requesting issuance of a summons, and specifying a full name and  
26 address for said defendant(s). Plaintiff is reminded that, pursuant to Rule 4(m) of the Federal Rules of

1 Civil Procedure, service must be accomplished within one hundred twenty (120) days of the date the  
2 complaint was filed.

3 4. If the Attorney General accepts service of process for any named defendant(s), such  
4 defendant(s) shall file and serve an answer or other response to the complaint within **thirty (30) days**  
5 following the date of the early inmate mediation. If the court declines to mediate this case, an answer  
6 or other response shall be due within **thirty (30) days** following the order declining mediation.

7 5. The parties **SHALL DETACH, COMPLETE, AND FILE** the attached Notice of Intent to  
8 Proceed with Mediation form on or before **thirty (30) days** from the date of entry of this order.

9 **IT IS FURTHER ORDERED** that henceforth, plaintiff shall serve upon defendants, or,  
10 if an appearance has been made by counsel, upon their attorney(s), a copy of every pleading, motion, or  
11 other document submitted for consideration by the court. Plaintiff shall include with the original paper  
12 submitted for filing a certificate stating the date that a true and correct copy of the document was mailed  
13 to the defendants or counsel for defendants. If counsel has entered a notice of appearance, the plaintiff  
14 shall direct service to the individual attorney named in the notice of appearance, at the address stated  
15 therein. The court may disregard any paper received by a district judge or a magistrate judge that has  
16 not been filed with the Clerk, and any paper which fails to include a certificate showing proper service.

17 **IT IS FURTHER ORDERED** that plaintiff's application to proceed *in forma pauperis*  
18 (docket #7) is **DENIED** as moot because the full filing fee has been paid (*see* docket #8).

19 **IT IS FURTHER ORDERED** that the following documents filed by plaintiff shall be  
20 **STRICKEN**: "Notice regarding correspondence to defendants" (docket #3); "letter to clerk with copy  
21 of business license card attached" (docket #4); and "letter to clerk re physical/mental health concerns  
22 and requesting appointment of attorney" (docket #6).

23  
24 DATED this 15th day of December, 2010.

25   
26 UNITED STATES DISTRICT JUDGE

1  
2  
3 Name \_\_\_\_\_

4 Prison Number \_\_\_\_\_

5 Address \_\_\_\_\_  
6 \_\_\_\_\_  
7 \_\_\_\_\_

8 UNITED STATES DISTRICT COURT  
9 DISTRICT OF NEVADA

10 \_\_\_\_\_, ) Case No. \_\_\_\_\_  
11 Plaintiff, )  
12 v. ) **NOTICE OF INTENT TO**  
13 ) **PROCEED WITH MEDIATION**  
14 \_\_\_\_\_ )  
15 Defendants. )

16 This case may be referred to the District of Nevada's early inmate mediation program. The  
17 purpose of this notice is to assess the suitability of this case for mediation. Mediation is a process by  
18 which the parties meet with an impartial court-appointed mediator in an effort to bring about an  
19 expedient resolution that is satisfactory to all parties.

20 1. Do you wish to proceed to early mediation in this case? \_\_\_\_ Yes \_\_\_\_ No

21 2. If no, please state the reason(s) you do not wish to proceed with mediation? \_\_\_\_\_  
22 \_\_\_\_\_  
23 \_\_\_\_\_

24 3. List any and all cases, including the case number, that plaintiff has filed in federal or state court  
25 in the last five years and the nature of each case. (Attach additional pages if needed).  
26 \_\_\_\_\_  
\_\_\_\_\_

- 1 4. List any and all cases, including the case number, that are currently pending or any pending  
2 grievances concerning issues or claims raised in this case. (Attach additional pages if needed).

3 \_\_\_\_\_  
4 \_\_\_\_\_  
5 \_\_\_\_\_

- 6 5. Are there any other comments you would like to express to the court about whether this case is  
7 suitable for mediation. You may include a brief statement as to why you believe this case is  
8 suitable for mediation. (Attach additional pages if needed).

9 \_\_\_\_\_  
10 \_\_\_\_\_  
11 \_\_\_\_\_

12 **This form shall be filed with the Clerk of the Court on or before thirty (30) days from the  
date of this order.**

13 Counsel for defendants: By signing this form you are certifying to the court that you have  
14 consulted with a representative of the Nevada Department of Corrections concerning participation in  
mediation.

15 Dated this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

16 \_\_\_\_\_  
17 Signature

18 \_\_\_\_\_  
19 Name of person who prepared or  
20 helped prepare this document